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IN THE

Supreme Court of the United States

Supreme Court, U.S.
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October Term 1971
No. .....

FRANK K. KING,

Appellant,

vs.

CITY OF SAN BERNARDINO, etc., *et al.*,

Appellee.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

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IN THE

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On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

The Opinions Below.

The opinion of the Court of Appeal, Fourth District, Second Division, State of California, certified for nonpublication, appears herein as Appendix A. No other written opinions have been delivered.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

(i) This is a declaratory relief action filed by Appellant in the San Bernardino Superior Court to declare the rights, obligations and duties between Appellant-Public Employee and Appellee-Employer, a Municipal Corporation. [R 1.][1] The dispute concerns Appellant's right to receive "compensatory time" for hours worked in excess of a forty hour week.

[1] "R" references are to the record on appeal.

The decisional law of the State purports to require a "written law" as a condition precedent to a public employee's receiving any rights or benefits to sums other than his official salary. The State has promulgated a statutory scheme limiting the number of hours an employer may require of an employee. California Labor Code Sections 510 to 556 inclusive.[2] As to "public" employees said statutory scheme is purportedly limited to only officers and employees of the City and County of San Francisco by virtue of Labor Code Section 555.

Appellant contended such a limitation violated the equal protection of the law, both State and Federal, in that it arbitrarily applied to only public employees within one city in the entire State of California. The California Supreme Court upheld the validity of Section 555 by denying appellant's petition for appeal from the lower court's decision.

Additionally, though not involving the validity of a state statute *per se*, appellant contended that the decisional law applied to the facts of this case arbitrarily discriminated against "public" employees as compared to employees in the "private" sector and to that extent violated the equal protection of the law, and further, because the claimed benefits were—in fact—granted to other employees of appellee similarly situated as appellant, that such "selective" granting of such benefits also was in violation of the equal protection of the law.

(ii) The judgment or decree sought to be reviewed is the decision of the Fourth District Court of Appeal affirming the trial court's Judgment of Dismissal. Said decision was filed on September 23, 1971, and ap-

[2]Said sections are set forth in full in Appendix B.

pears at Appendix A herein. A Petition for Rehearing before the District Court of Appeal was denied and Petition for Hearing on Appeal to the California Supreme Court was denied on November 18, 1971 appearing as Appendix C herein. No petition for rehearing before the California Supreme Court was filed. The Notice of Appeal was filed in the Court of Appeal, Fourth District, Second Division, State of California, the court possessed of the record, on December 13, 1971 and appears herein as Appendix D.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

Cohen v. California, ... U.S. ....., 29 L. Ed. 2d 284 (1971);

Missouri v. Canada (1938) 305 U.S. 337, 83 L. Ed. 208;

Dahnke-Walker Milling Company v. Bon Durant, 257 U.S. 282, 66 L.Ed. 239 (1921).

(v) The validity of Section 555 of the California Labor Code is here involved. The full text of said section is as follows:

Section 555. Applicability to cities and counties

"Sections 550, 551, 552 and 554 of this chapter are applicable to cities which are cities and counties and to the officers and employees thereof."[3]

In California the classification of *a* "city" by the phrase "city and county" applies only to the consolidat-

[3]The full text of Sections 550, 551, 552 and 554 are set forth in Appendix B.

ed governmental entity known as the "City and County of San Francisco" *Martin v. Election Committee* (1899) 126 Cal. 404; *Stout v. Democratic Central Committee* (1952) 40 Cal.2d 91 and the point is conceded by appellee. [R 16, p. 12.] There exists no other similar governmental entity in the entire state. Therefore, by its own express terms, Section 555 purports to apply the otherwise state-wide statutory scheme related to work hours only to "public" employees of that particular governmental entity and to no other governmental employees within the State of California.

The California Supreme Court has, in other contexts, held his statutory classification to be an invalid special and local protection. *Holman v: Warren,* 32 Cal. 2d 351; *Strout v. Democratic Central Committee supra.* Though raised in the trial court below this issue has not been treated by the courts herein except to state, "Moreover, as pertains to cities, this statutory scheme is limited to 'cities which are cities and counties and to the officers and employees thereof.' "[4]

Questions Presented by This Appeal.

The following questions are presented by this appeal:

1. Does a state statute relating to minimum hours of labor that applies to all employees in the "private" sector of the state violate equal protection provisions of the United States Constitution Fourteenth Amendment because it applies only to "public" employees within the City and County of San Francisco.

2. Does state decisional law that discriminates against "public" employees—without any attempt to

[4]Page 3, paragraph 4, of the unpublished opinion of the Fourth District Court of Appeal herein attached as Appendix A.

apply reasonable standards—violate the equal protection provisions of the Fourteenth Amendment?

3. Does governmental action that dispenses benefits to some public employees similarly situated and denies it to others on a "selective" basis having no ascertainable standard violate the equal protection provisions of the Fourteenth Amendment?

Statement of the Facts of the Case.

Appellant was an employee of a private bus company when it was acquired by appellee in 1961 and became the San Bernardino Municipal Transit System. Upon said acquisition appellant was duly appointed by the city government as Superintendent of said system and has remained in that position to date. He thereby became an unclassified employee of appellee's Civil Service.

Down through the years appellant was led to believe that any hours he worked in excess of a normal forty-hour week would entitle him to "compensatory time", *i.e.* he would be given equal time off with pay and if terminating from the Civil Service would be paid his ordinary salary rate for the accumulated compensatory time. On numerous occasions appellant *was* granted such time off with pay as were other civil servants similarly situated as appellant within the unclassified civil service of appellee. Other similarly situated employees who terminated were paid for their accumulated compensatory time during this period.

Not until the year 1969 was there any question raised as to this administrative practice. In that year the city administration sought to negotiate with appellant and other city employees who had accumulated

compensatory time and for the first time passed a Resolution[5] that referred to compensatory time as it applied to employees such as appellant. Prior to that date the only "written law" of said city concerning compensatory time applied exclusively to its police and fire employees. Even after the passage of said Resolution appellant was granted time off on the basis of his accumulated compensatory time.

Appellant is an efficient and capable city employee, winning national awards for his department and receiving official commendations from the Mayor and Common Council of appellee for his efforts. He incurred the compensatory time not because he could not do his assigned duties within the normal work week but mainly because appellee would not, or could not, hire sufficient employees for his department necessitating his performing duties normally performed by others.

Appellant accumulated 2,627 hours of such compensatory time over the years and when he requested extended time off to use same he was advised by appellee's administration that his services could not be spared for long periods. Therefore, he was only allowed to take short periods. That is, until July, 1970 when appellant was for the first time officially advised that he was not entitled to the claimed benefit. Said compensatory time was kept on the official payroll records of appellee until on or about July, 1970 when it was arbitrarily taken off said records by the appellee's officials.

Appellant filed a complaint for Declaratory Relief in San Bernardino Superior Court, No. 15171 on August 31, 1970 against appellee and raising the issue of

[5]Resolution No. 9974 passed on September 23, 1969.

equal protection of the law. [R 1.] Appellee was duly served and filed a Demurrer to the Complaint on September 29, 1970 [R 3] contending *inter alia,* that appellant had not alleged the existence of a "written" law authorizing compensatory time for a public employee such as appellant.

Written Points and Authorities in Support of Demurrer were filed by appellee raising the sole issue of the lack of a "written law" in existence to justify appellant's claim in view of the decisional law of California [R 4.] Appellant referred to the above-cited California Labor Code sections and sought to show their applicability by virtue of legislative construction in his Points and Authorities in Opposition. [R 5.] There followed Supplemental Points and Authorities by appellee [R 6] and appellant [R 7] and Second Supplemental Points and Authorities by appellee. [R 8.] In oral argument before the trial court appellant contended that to apply the statutory scheme envisioned by the Labor Code Sections in question *only* to the City and County of San Francisco was clearly a violation of the equal protection provisions of the law.

The trial court sustained the Demurrer [R 9] and Judgment of Dismissal was thereafter entered [R 10] and appeal taken to the Fourth District Court of Appeal.

Appellant's Opening Brief [R 11], at page 5, contended that there was no reasonable classification in construing the limitations of the statutory wage scheme *only* to the City and County of San Francisco raising the equal protection provisions of the law and cases thereon. Respondent's Brief [R 12] ignored the issue and Appellant's Reply Brief [R 13] merely argued issues raised in Respondent's Brief.

In oral argument before the Fourth District Court of Appeal the appellant stressed the equal protection provisions, as herein advanced, contending they were the basic issues of this case. In affirming the decision below, and respecting Labor Code Section 555, the appellate court merely restated that section as a limitation on the statutory scheme. (See footnote 4.)

Appellant filed a Petition for Rehearing in the District Court of Appeal [R 14] which was denied and thereafter a Petition for Hearing in the California Supreme Court. [R 15.] Appellee filed an Answer which for the first time in this action, takes issue with the unconstitutionality of Section 555 of California's Labor Code. [R 16 at p. 11.]

The Federal Questions Presented Are Substantial.

If appellant were an employee of a private bus company instead of a municipal transit system he would unquestionably be entitled to the benefits contemplated by the state's statutory scheme under the facts of this case. Furthermore, it is highly probable that a "private" employer would be faced with penal sanctions for conducting himself the way the city-employer has done here. Thus, this appeal squarely raises the issue of the applicability of the equal provisions of the Fourteenth Amendment as between "public" and "private" employees and the limitations in California Labor Code Section 555.

1. Does a State Statute Relating to Minimum Hours of Labor That Applies to All Employees in the "Private" Sector of the State Violate Equal Protection Provisions of the 14th Amendment Because It Applies Only to "Public" Employees Within the City and County of San Francisco?

> "It is the established law of this state that in the absence of statutory provisions a public employee is not entitled to compensation for overtime worked." *Simpson v. Cranston* (1961) 56 Cal. 2d 63 at 65.

Appellant contends that the statutory scheme for hours as set forth in California Labor Code Sections 510 to 556 inclusive (See Appendix B) satisfies this common law requirement of a "written law". (Appellant also contended in the court below that the "necessary and proper" provisions of the City Charter of appellee met this requirement). It is contended that but for the express limitations contained in Section 555 of said Code, those hourly limitations *would* apply to appellant. As construed and applied by the courts below said scheme now only applies to *all* employees in the "private" sector of the state's employment forces and *only* to the "public" employees of the City and County of San Francisco.

Appellant concedes that a state may reasonably differentiate between geographical areas without violating the equal protection of the law. *Salsburg v. Maryland* (1954) 346 U.S. 545, 98 L. Ed. 281; *South Carolina v. Katzenbach* (1966) 383 U.S. 301, 15 L. Ed. 2d 787. However, there should be a reasonable basis for such legislative differentiation. In the *Salsburg* and *South Carolina* cases it was clearly shown that certain factors existed in certain geographic areas (crime in certain counties in *Salsburg* and voter discrimination

in certain states in *South Carolina*) that warranted different treatment. In the instant case there appears no rational reason for isolating the City and County of San Francisco from other governmental subdivisions within California. It is not the largest city, in area or population, nor the smallest. Nor is it the only one with an ocean bay. It is hard to conceive of a reason why this one geographic area was singled out of the entire state to treat its public employees differently.

Since the construction of this state statute concerns not only appellant's rights herein but the entire class of "public" employees outside of the City and County of San Francisco it is submitted a substantial question is presented.

2. Does State Decisional Law That Discriminates Against "Public" Employees—Without Any Attempt to Apply Reasonable Standards—Violate the Equal Protection Provisions of the Fourteenth Amendment?

Initially, whether the "authority" relied upon by appellee in denying appellant the claimed benefits arises out of a state statute or case law is immaterial because each constitutes "state action". *New York Times v. Sullivan* (1964) 376 U.S. 254, 11 L. Ed. 2d 686; *Shelley v. Kraemer* (1948) 334 U.S. 1, 92 L. Ed. 1161.

The decisional rule of law in question is as most succinctly stated in *Simpson v. Cranston, supra,* as quoted above. However, it is submitted that the reason for this rule of law is most aptly stated in *Buck v. City of Eureka* (1895) 109 Cal. 504 at 520 as follows:

> "It is of the last importance that any and every public officer entering upon the discharge of *his* duties should know once and for all that, be the duties onerous or be they easy, the compensation

for them must be that fixed by law, and that only. If they become too burdensome, the law does not forbid the officer's resignation; but it does emphatically say that *he* shall not, under any circumstances, by use of the power of *his* office, by contract express or implied, fair or unfair, or by aid even of legislative enactment, obtain increased compensation for their performance." (Emphasis added.)

Clearly, the intent and purpose of said rule of law is to prevent public employees from *using their power of public office* to further their own personal gain. One can not argue with the validity and reasonableness of such a rule. However, in order to mean anything it should apply *only* to those in public office who actually have the "power", by virtue of their official position, to alter their emoluments.

Appellant has no such power and must always answer to his superiors in the city's administration. For example, when he was ordered to cease incurring "compensatory time" he did so. At all times material herein he was merely complying with accepted administrative praetice laid down by his superiors.

Having stated the purpose of that law what is the relevance of the purpose to the number of persons within the classification involved? A question of "under-inclusion" or "over-inclusion" (See 82 HLR 1065 Developments in the Law: Equal Protection) When applied to *all* public employees, as California has done it appears to be "over-inclusion". *Buck v. City of Eureka, supra* (a "special" city attorney); *Demerrit v. Weldon* (1908) 154 Cal. 545 (elected Marshal); *Adams v. City of Modesto* (1960) 53 Cal. 2d 833

(police officers); *Martin v. Henderson* (1953) 40 Cal. 2d 583 (California Highway Patrol officers); *Treu v. Kirkwood* (1954) 42 Cal. 2d 602 (a secretary). On its face the rule of law is overly broad. What degree of "power" do *all* public employees have over their own jobs? It would seem that the rule has relevance only to those public employees who can—by virtue of their office—increase their benefits, *e.g.* elected officials. Yet, strangely enough, elected officials were allowed to do so in a recent California case, *Porter v. City of Riverside* (1968) 68 Cal. Rep. 313. (City councilmen voted themselves a higher "expense allowance" despite city charter provision denying any compensation—trial court's judgment reversed on evidentiary grounds).

California's applying this common Law rule across-the-board as to all public employees clearly discriminates against those employees who do not fit within the purpose of the law. Appellant is one of these. It is one more facet of the continuing struggle of public employees to achieve some parity with their counterparts in the private employment sector. [See R 15, List of Periodicals, Ex. "B", Appellant's Petition for Hearing in California Supreme Court.] The Common Law itself recognized that when the reason for the rule no longer existed then the rule should be altered. *Katz v. Walkinshaw*, 141 Cal. 116.

3. Does Governmental Action That Dispenses Benefits to Some Public Employees and Denies It to Others on a "Selective" Basis Having No Ascertainable Standard Violate the Equal Protection Provisions of the Fourteenth Amendment?

Concededly, we have a "narrower" concept of state action here because appellant complains of discriminatory and unequal conduct on the part of the officials of a city government. It is submitted that the reasoning in the *New York Times* and *Shelly* cases cited above applies equally here because the deprivation of appellant's benefits has been predicated upon that same rule of state decisional law referred to hereinabove.

> "The test is not the form in which the state power has been applied but, whatever the form, whether such power has been exercised," *New York Times v. Sullivan*, 376 U.S. 254 at 265, 11 L. Ed. 2d 686 at 697. See also, *Cooper v. Aaron* (1958) 358 U.S. 1, 3 L. Ed. 2d 5.

When a governmental entity seeks to impose burdens or dispense benefits to its citizens it is unquestionable that it should do so without arbitrary discrimination. *Skinner v. Oklahoma* (1942) 316 U.S. 535, 86 L. Ed. 1655. It is submitted that the same beneficent attitude should apply to its *own employees*.

Appellant's complaint herein [R 1] alleges that other employees "similarly situated" as appellant (*i.e.*, within the same civil service classification) have received the benefits claimed herein by appellant. Obviously such benefits were dispensed by city government without any ascertainable standard. It is submitted—and contended that evidence would show—that such benefits were made available to those whose "political" per-

suasions were more acceptable to the city administration. This is not a "government of laws" but clearly a "government of men".

The California Supreme Court has recognized this concept in a case involving restraints upon the political activities of a public employee (a nurses' aid) by reinstating her and holding a state statute (not here material) unconstitutional. Justice Tobriner's response to the public agency's argument that "no person has a constitutional right to public employment" is apropos.

> "Despite the antiquity of this argument, its reasoning today stands utterly discredited. Although an individual can claim no constitutional right to obtain public employment or *to receive any other publicly conferred benefit*, the government can not condition admission to such employment or receipt of such benefits upon any terms that it may choose to impose. —Today courts and commentators alike recognize without question that the power of government, federal or state, to withhold benefits from its citizens does *not* encompass a supposed 'lesser' power to grant such benefits upon an arbitrary deprivation of constitutional right. —Just as we have rejected the fallacious argument that the power of government to impose such conditions knows no 'limits', so must we acknowledge that the government may, when circumstances inexorably so require, impose conditions upon the enjoyment of publicly conferred benefits despite a resulting qualification of constitutional rights. In doing so, however, the government bears a heavy burden of demonstrating the practical necessity for the limitation. *At the very least it must establish that the imposed condi-*

tions relate to the purposes of the legislation which confers the benefit or privilege." Bagley v. Washington Township Hospital District (1966) 65 Cal. 2d 499 at 503 (emphasis added). See also *Slochower v. Board of Education* (1955) 350 U.S. 551, 100 L. Ed. 692.

It is submitted that the same reasoning should apply to appellant's receipt of the claimed "benefits" herein. To deny it is to allow a public employer to mislead its own employees who have provided services according to a long-standing practice—something no "private" employer would be allowed to do. In effect, it allows the government "to do wrong".

Conclusion.

Appellant merely seeks what he has *earned* from his employer. He was not only promised this over many years but from time to time given these benefits. Perhaps he would have continued to receive those benefits if the city's political administration in power at that time had been more "friendly".

It is clear that if appellant were employed by a "private" transit company he could recover these benefits under one of the several legal theories, and in that context the California Labor Code would be a basis for his claim plus provide penal sanctions against the private employer. Merely because appellant is a "public" employee, without more, seems unreasonable to achieve a directly opposite result. The statute and decisional law that presently require this result are un-

just. On occasion California's courts have recognized the result as "unjust" while providing no relief.[6] The instant case has sufficient facts to warrant a reversal of the state law in this area and achieve a "just" result for appellant and others in similar employment.

Dated: December 21, 1971.

Respectfully submitted,

R. R. CAMPAGNA,
Attorney for Appellant.

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[6]See Justice Carter's dissenting opinion in *Martin v. Henderson*, and in *La Deaux v. County of Alameda*, 256 Cal. App. 2d 261 involving compensatory time for a deputy sheriff where dissenting opinion states "The result is an unjust one," at 269. Also, the opinion of the Fourth District Court of Appeal in the instant case "sympathizes" with appellant's plight. (Appendix A, p. 6.)

APPENDIX A.

Notice of Appeal to the Supreme Court of the United States.

Court of Appeal, Fourth District, Second Division, State of California.

Frank K. King, Plaintiff and Appellant, vs. City of San Bernardino, etc., *et al.*, Defendants and Respondents. No. 4 Civil 10991. (Sup. Ct. No. 151751).

NOTICE IS HEREBY GIVEN that FRANK K. KING, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Fourth District Court of Appeal's unpublished decision, entered on September 23, 1971 in this action affirming the trial court's judgment of dismissal. This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

/s/ R. R. Campagna,
R. R. CAMPAGNA,
Attorney for appellant,
Frank K. King

APPENDIX B.

California Labor Codes, Sections 510 to 556 Inclusive.

Section 510. Day's work

Eight hours of labor constitutes a day's work, unless it is otherwise expressly stipulated by the parties to a contract.

Sections 511 to 549. Blank

Section 550. Day's rest defined

As used in this chapter "day's rest" applies to all situations whether the employee is engaged by the day, week, month, or year, and whether the work performed is done in the day or night time.

Section 551. One day's rest in seven

Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven.

Section 552. Maximum consecutive working days

No employer of labor shall cause his employees to work more than six days in seven.

Section 553. Violation; misdemeanor

Any person who violates this chapter is guilty of a misdemeanor.

Section 554. Exemptions

This chapter shall not apply to any cases of emergency nor to work performed in the necessary care of animals, crops or agricultural lands, nor to work performed in the protection of life or property from loss or destruction, nor to any common carrier engaged in or connected with the movement of any train. Nor shall the provisions of this chapter apply when the employer and a labor organization representing employees of such employer have entered into a valid collective bargain-

ing agreement respecting the hours of work of such employees. Nothing in this chapter shall be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires that the employee work seven or more consecutive days, providing that in each calendar month the employee receive days of rest equivalent to one day's rest in seven. The requirement respecting the equivalent of one day's rest in seven shall apply, not withstanding the other provisions of this section relating to collective bargaining agreements, where the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement respecting the hours of work of the employees, unless the agreement expressly provides otherwise.

In addition to the exceptions herein, the Chief of the Division of Labor Law Enforcement may, when in his judgment hardship will result, exempt any employer or employees from this chapter. Nothing contained herein shall affect contracts existing on the effective date of this amendment.

Section 555. Applicability to cities and counties

Sections 550, 551, 552 and 554 of this chapter are applicable to cities which are cities and counties and to the officers and employees thereof.

Section 556. Exemption for 30 hour week and six hour day

This chapter shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof.

APPENDIX C.

Opinion of the Court of Appeal.

Court of Appeal, Fourth District, Second Division, State of California.

Frank K. King, Plaintiff and Appellant, vs. City of San Bernardino, etc. *et al.* Defendants and Respondents. 4 Civil 10991, (Sup. Ct. No. 151751).

Filed: Sept. 23, 1971.

APPEAL from a judgment of the Superior Court of San Bernardino County. Joseph T. Ciano, Judge. Affirmed.

R. R. Campagna, for Plaintiff and Appellant.

Ralph H. Prince, City Attorney, and Arthur J. Shaw, Jr., Assistant City Attorney, for Defendants and Respondents.

Appellant filed a complaint for declaratory relief claiming he was entitled to compensatory time or monetary remuneration for hours worked in excess of forty hours per week while he was superintendent of the San Bernardino Municipal Transit System. Respondent City demurred for failure to state a cause of action in that the complaint failed to allege the existence of a law or resolution authorizing compensatory time off or overtime pay, and for the same reason that the complaint was uncertain. The demurrer was sustained on all grounds, with leave to amend. The appellant elected to stand upon the complaint without amendment and judgment of dismissal was thereafter entered.[1] Appellant appeals from the judgment of dismissal.

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[1]Technically, the trial court erred in sustaining the demurrer and entering the judgment of dismissal thereafter. In an action for declaratory relief the complaint is sufficient if it sets forth facts showing the existence of an actual controversy relating to

Appellant's complaint raises two issues: He first alleged he had been authorized and entitled to receive compensatory time for hours worked in excess of a forty-hour week, or to receive monetary remuneration in lieu thereof. Secondly, he alleged other officers and employees of the city similarly situated received compensatory time or monetary remuneration, and the failure to grant such rights to him constitutes violations of due process and equal protection of the law under the California and Federal Constitutions.

Viewing all material and issuable facts pleaded as admitted, as we must when judging the sufficiency of a complaint challenged by a demurrer (*Flores v. Arroyo*, 56 Cal.2d 492, 497), the complaint shows the following facts: Appellant has served as a civil service employee of the City of San Bernardino as the Superintendent and department head of the San Bernardino Municipal Transit System since July 1961. Appellant has submitted records showing the number of hours worked in excess of forty hours per week, and the respondent City prepared records reflecting such number of hours. Appellant has requested leaves of absence based on the accumulated hours, but respondent City has refused and continues to refuse to grant such leaves, except for short leaves deducted from the accumulated hours, because of a city resolution prohib-

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the legal rights and duties of the respective parties under a contract and requests that the rights and duties be adjudged. If these requirements are met, the court must declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration. (*Maguire v. Hibernia S.&L.Soc.*, 23 Cal.2d 719, 729, 730.)

Since, however, the judgment of dismissal, entered after the demurrer was sustained, effectively determined the issues raised, failure to enter a judgment on the declaratory relief demand is not reversible error. (*Haley v. L.A. County Flood Control Dist.*, 172 Cal.App.2d 285, 292-294.)

iting compensatory time off or monetary remuneration therefor. Other employees, situated similarly to appellant have, however, received time off for hours which they have worked above a forty-hour week, or have been paid for the accumulated hours upon separation from city service.

"It is established law in this state that in the absence of statutory provisions a public employe [sic] is not entitled to compensation for overime worked." (*Simpson v. Cranston*, 56 Cal.2d 63, 65; *Adams v. City of Modesto*, 53 Cal.2d 833, 835; *Jarvis v. Henderson*, 40 Cal.2d 600, 606; *Martin v. Henderson*, 40 Cal. 2d 583, 589-590; *Welshans v. City of Santa Barbara*, 205 Cal.App.2d 304, 308-309.)

Recognizing this general principle, appellant concedes his claim must be based on "written" laws. He contends his claim is based on Labor Code, §§510-556, and on §40, subd. 27 of the San Bernardino City Charter.

Although Labor Code, §§510-556 were thought by Justice Carter, in his dissenting opinion in *Martin v. Henderson, supra*, 40 Cal.2d 583, to be sufficient statutory authorization for overtime compensation, that view has not been adopted by any court of this state. Moreover, as pertains to cities, this statutory scheme is limited to "cities which are cities and counties and to the officers and employees thereof." (Labor Code, §555.)

Although we do not have the San Bernardino City Charter before us, judicial notice of its provisions may be taken. (Evidence Code, §451(a).) Section 40, subd. 27 of the Charter provides the governing body may do that which is "necessary and proper" to operate the city government. Even though this provision may be

sufficient to authorize the city to operate a public transportation system, it does not follow that it of necessity, entitles employees thereof to overtime compensation. Appellant suggests, however, continued "administrative practice" by respondent City shows overtime compensation is required. This suggestion is foreclosed by *Martin v. Henderson, supra,* 40 Cal.2d 583, 590:

> "The fact that normal hours of work are established and compensating time off is provided for work beyond those hours does not, of itself, give the employee a right to payment for overtime." (See also *Pootel v. City and County of S.F.*, 125 Cal.App.2d 378, 381.)

Appellant argues, citing *City of Long Beach v. Mansell,* 3 Cal. 3d 462, respondent City should be estopped from raising the lack of statutory authorization for overtime compensation, since he was led to believe he would be entitled to compensatory time for hours worked in excess of forty per week and since other employees similarly situated were granted monetary remuneration in lieu of compensatory time when they terminated their employment with respondent City.

Mansell established the broad proposition that:

> "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (3 Cal. 3d 462, 496-497.)

Mansell recognized, however, the government conduct there involved and the extensive reliance thereon created "an extremely narrow precedent for application in future cases." (3 Cal. 3d 500.) Appellant cites no cases, and independent research has disclosed none, where an estoppel has been raised against a public entity under like circumstances of employment.

In both *Martin v. Henderson, supra,* 40 Cal.2d 583, and *Jarvis v. Henderson, supra,* 40 Cal.2d 600, however, the circumstances were similar to those alleged by appellant. In both *Martin* and *Jarvis,* highway patrolmen had worked hours in excess of a forty-hour week, while Highway Patrol Orders were in effect which authorized compensatory time off. Both Martin and Jarvis had accumulated compensatory hours, recorded on Highway Patrol records. Several years later, the accumulated hours were cancelled, however, and compensatory payment refused because the Highway Patrol could find no statutory authorization for granting compensatory time off, or compensatory payment. Because, at the time the services were rendered, no statute existed which permitted additional compensation for services performed under the monthly fixed salaries, neither Martin or Jarvis could recover. The court noted:

> "The statutory and regulatory limitations upon compensation for services are but a codification and application to civil servants of the oft-repeated rule 'that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary.' . . . The rule applies not only to the duties themselves . . . but also to the hours of work. When the employee is paid by time, as by the day, week, or month rather than by the amount of work which he does, he is bound, in the

absence of statute, to render services without regard to the number of hours worked." (40 Cal. 2d 589-590.)

Because appellant worked in a position of professional responsibility which required, not a specific number of hours of work, but instead, that his services accomplish a particular task at a fixed salary, we do not perceive an injustice under the alleged facts which would require us to find an estoppel and overturn the long-established rule, recapitulated in *Martin v. Henderson, supra,* 40 Cal.2d 583.

Appellant suggests, without full discussion, that "other officers and employees of said City similarly situated to plaintiff have received such compensatory time or monetary remuneration in lieu thereof." If he was denied such benefits for overtime worked, and no law or resolution provided for such payment, he is not denied the equal protection of the laws simply because others are improperly given such benefits. His exclusion is not due to any intervention of the law. The law as to appellant is the same as the law for everyone else. The discrimination he alleges is due to improper, perhaps illegal, acts of other public officials. Such illegality or impropriety does not justify his inclusion in the improperly benefited group. If administrators of the City of San Bernardino do discriminate in favor of certain other employees similarly situated, remedies exist to stop such discrimination. We hold the appellant cannot seek to augment the group improperly benefited.

Assuming intentional discriminatory action improperly benefited some employees, what relief may the trial court grant appellant? Any judgment would have to

be framed to stop all improper reimbursement to employees for overtime worked. While we have every sympathy for appellant, assuming the truth of the matters pleaded, they do not state a cause of action and the demurrer was properly sustained.

The judgment is affirmed.

CERTIFIED FOR NONPUBLICATION.

Gabbert, *J*.

We concur:

Gardner, *P. J.*
Kerrigan, *J.*

APPENDIX D.

Order Denying Hearing After Judgment by the Court of Appeal, 4th District, Division 2, Civil No. 10991.

In the Supreme Court of the State of California, in Bank.

King v. City of San Bernardino et al. Order Due November 22, 1971.

Filed: Nov. 18, 1971.

Appellant's petition for hearing DENIED.

/s/ Wright
Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 13th day of December A.D. 1971.

By /s/ R. C. Matteali
Deputy Clerk

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1971

No. 71-822

FRANK K. KING,

Appellant,

vs.

CITY OF SAN BERNARDINO, et al

Appellee.

ON APPEAL FROM THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO, OF THE STATE OF CALIFORNIA

MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-822

FRANK K. KING,

Appellant,

vs.

CITY OF SAN BERNARDINO, et al

Appellee.

ON APPEAL FROM THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO, OF THE STATE OF CALIFORNIA

MOTION TO DISMISS

Pursuant to Rule 16(1)(b) of the Rules of this Court, appellee moves that the appeal of the Appellant be dismissed on the following grounds:

1. The Federal question sought to be reviewed was not timely or properly raised or expressly passed upon by the Courts of California.

2. The judgment rests on an adequate non-Federal basis.

STATEMENT

On appeal to the Court of Appeal, Fourth Appellate District, of the State of California, no Federal questions were raised by Appellant. In fact, Appellant's Opening Brief (page 3) in that court stated the issues or questions to be as follows:

> "Statement of Issues
>
> 1. Does there exist a specific 'written' law, ordinance or resolution upon which Appellant may base his claim?
>
> 2. Assuming, *arguendo*, there is no specific 'written law,' ordinance or resolution upon which to base said claim do the facts and circumstances herein require the application of some principle of law or equity to afford Appellant relief?"

Appellant's Reply Brief filed in the Court of Appeal again (page 2) restated the issues in the identical language above stated, concluding that "Appellant's Statement of Issues is clear, i.e.:

> 1. Does there exist a specific 'written' law, ordinance or resolution upon which Appellant may base his claim?
>
> 2. Assuming, *arguendo*, there is no specific 'written' law, and/or resolution upon which to base said claim do the facts and circumstances herein require the application of some principle of law or equity to afford Appellant relief?"

The opinion of the Court of Appeal did not, therefore, discuss or pass upon any of the Federal constitutional questions now raised.

Subsequent to the decision of the Court of Appeal, the Appellant filed a Petition for Rehearing in the Court of Appeal, which was denied without opinion by said court. In that Petition for Rehearing, Appellant makes an allegation (pages 2-3) that he had made general averment in his Opening Brief that Labor Code Section 555 was unconstitutional.

On page 5, paragraph 2, of Appellant's Opening Brief, it was merely stated that:

> "Appellant contends there is no reasonable classifiction, or sense, in construing this limitation to that one city only. Cal. Const., Art. 1, Sections 11 and 21 and Article IV Section 25; *Hollman v. Warren*, 32 Cal. 2d 351; *Stout v. Demo. Cent. Comm.*, 40 Cal. 2d 91."

The reference hereinabove set forth was the only one made in the Court of Appeal in regard to a constitutional matter and no Federal issues were submitted to or decided by the Court of Appeal.

In his Complaint for Declaratory Relief Appellant made no allegation or averment that Labor Code Section 555 was unconstitutional. Appellant only alleged in Paragraph XII thereof that the resolution of the legislative body of the City of San Bernardino in its application to Appellant deprived him of due process of law and the equal protection of the law as set forth in the Constitutions of the State of California and of the United States.

Nowhere in the Complaint did Appellant refer to or cite Labor Code Section 555; nor did he allege that said State statute was unconstitutional under either the State or Federal Constitutions. In the prayer for judgment, Appellant merely asked for a judgment by way of declaratory relief that Appellant is entitled to compensatory time off or monetary remuneration in lieu thereof.

Appellant's Petition for Hearing in the California Supreme Court (page 2) raised, for the first time during the proceedings, the following constitutional question:

> "A. The arbitrary classification contained in California Labor Code §555 (restricting its application only to cities which are a 'city and county') is unconstitutional."

The allegation was made at page 3 that "such an interpretation is in violation of California CNTN (sic) Art. I, Secs. 11 and 21 and Art. IV, Sec. 25." It was contended at such late date that only a state constitutional question existed. No averment of a Federal constitutional question was made in the Appellant's Petition for Hearing in the California Supreme Court. The Petition was denied by the Supreme Court of California without opinion.

No opinion of the trial court, Court of Appeal or the Supreme Court of California discusses or passes upon any Federal Constitutional questions.

QUESTIONS PRESENTED

1. Where Federal constitutional questions are not properly raised by Appellant in proceedings seeking compensatory time off or monetary remuneration in lieu thereof, either in the State trial or appellate courts, and the opinions and orders of such Courts do not discuss or pass on any Federal questions, does the jurisdiction of the Supreme Court attach to an appeal from a state judgment denying the relief sought by Appellant?

2. Does the judgment of the Court of Appeal rest upon an adequate non-Federal basis?

ARGUMENT

1. THE APPEAL FAILS BECAUSE OF WANT OF JURISDICTION.

Prior to the filing of the Jurisdictional Statement in the Supreme Court of the United States, Appellant did not properly raise any Federal Constitutional questions. The validity of Labor Code Section 555 was, as hereinabove reviewed, never properly raised.

The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a state court, it must appear that the alleged Federal questions were raised in the state courts at the proper time and in the manner required by state law. *Hulbert v. Chicago*, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026 (1906); *Brown v. Commonwealth of Mass.*, 144 U.S. 573, 580, 12 S. Ct. 757, 759, 36 L. Ed. 546 (1892); *John v. Paullin*, 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381 (1914).

The laws of the State of California require that constitutional questions be properly raised in the trial court and, if not, they will not be considered on appeal. *Sacramento and San Joaquin Drainage District v. Superior Court*, 196 Cal. 414, 422-423, 238 P. 687 (1925); 1 Cal. Pleading "Pleading Facts of a Legal Nature", Sec. 894. Furthermore, only errors on constitutional questions pointed out in the brief will be considered. An appellant who fails to present a point in his brief is precluded from insisting that the court consider the matter, and the court will not consider on a petition for rehearing questions not previously raised. 4 Cal. Jur. 2d, Appeal and Error, Sec. 480; *Epperson v. Rosemond*, 100 Cal. App. 2d 344, 223 P. 2d 655, 224 P. 2d 480 (rehearing denied) (1950).

2. THE JUDGMENT OF THE COURT OF APPEALS RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

The appellant, as alleged in his complaint, is a department head of the appellee and an unclassified member of its civil service. The Court of Appeal found that (Jurisdictional Statement, Appendix, p. 9) "appellant worked in a position of professional responsibility which required, not a specific number of hours of work, but instead, that his services accomplish a particular task at a fixed salary . . ."

The Court of Appeal held that the prevailing divisional law applicable to appellant as such a professional person was clear and certain. (Jurisdictional Statement, Appendix, p. 6).

> " 'It is established law in this state that in the absence of statutory provisions a public employe (sic) is not entitled to compensation for overtime worked.' (*Simpson v. Cranston*, 56 Cal. 2d 63, 65; *Adams v. City of Modesto*, 53 Cal. 2d 833, 835; *Jarvis v. Henderson*, 40 Cal. 2d 600, 606; *Martin v. Henderson*, 40 Cal. 2d 583, 589-590; *Welshans v. City of Santa Barbara*, 205 Cal. App. 2d 304, 308-309)."

Even if California Labor Code Section 555 was found to unconstitutionally limit the application of Section 550 to 554 to only officers and employees of the City and County of San Francisco, thereby depriving Appellant of the equal protection of the law, Appellant would still not prevail because there is no statutory or legislative authority to permit payment for overtime or compensatory time off.

Sections 510 to 556 of the California Labor Code merely define a "day's work" (§510), a "day's rest" (§550) and provide for one day's rest in seven (§551), maximum consecutive working days (§552), violation of the chapter (§553); exemptions (§554), applicability to cities and counties (§555), and exemption for a 30 hour week and a six hour day (§556). None of these sections authorize compensation for those hours worked in excess of the eight hour day. None of the Labor Code sections relied upon by the Appellant can be construed to be the "written law" which the decisional law of the State requires as a condition precedent to the receipt by a public employee of any compensatory rights or benefits other than his official salary (Jurisdictional Statement, Appendix, p. 6 for overtime work).

CONCLUSION

For all of the foregoing reasons appellee moves that this appeal be dismissed.

Respectfully submitted,

RALPH H. PRINCE,
Attorney for Appellee.

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IN THE

Supreme Court of the United States

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October Term, 1971
No. 71-822

FRANK K. KING,

Appellant,

vs.

CITY OF SAN BERNARDINO, etc., *et al.*,

Appellee.

On Appeal From the Court of Appeal, Fourth Appellate District, Division Two, of the State of California.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-822

FRANK K. KING,

Appellant,

vs.

CITY OF SAN BERNARDINO, etc., *et al.*,

Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS.

Pursuant to Rule 16(3) of the Rules of this Court, Appellant files herewith his Brief in Opposition to the Motion to Dismiss received January 24, 1972, making the following contentions:

1. The Federal questions sought to be reviewed were timely and properly raised in the State Courts of California.

2. Judgment of the State Court herein can not reasonably be interpreted to rely on a non-federal basis.

Statement.

Initially, Appellant points out that potential constitutional issues were raised in this case as early as the pleading stage (Record No. 1—paragraph XIII, not XII.) Upon the filing of Respondent's Demurrer Appellant referred to the constitutional issues in his Points and Authorities in Opposition to Demurrer (Record

No. 4, p. 7, line 4) which was not referred to by Respondent in his Supplemental Points and Authorities in Support of Demurrer (Record No. 6) or his Second Supplemental Points and Authorities in Support of Demurrer (Record No. 8).

At the hearing on the Demurrer held before the Honorable Joseph T. Ciano, Department XI, San Bernardino Superior Court, Appellant specifically referred to Labor Code Section 555 and its application only to the City and County of San Francisco as being in violation of equal protection of the laws. Again said issue was ignored by Appellee in oral argument and the trial court sustained the Demurrer "upon all the grounds stated in the Demurrer" (Record No. 9) and Judgment of Dismissal followed (Record No. 10).

Appellant did continue to raise the constitutional questions in his Opening Brief on Appeal to the 4th District Court of Appeal (Record, No. 11, p. 5, paragraph 2 and p. 10, paragraph 4).

On the hearing before the 4th District Court of Appeal Appellant made the following prefatory statements in oral argument:

> "I would like to elaborate on issues raised in the court below but not treated with any degree of depth as yet in this action. This is partly due to the trial court's obvious reliance on the cases cited by Respondent herein and partly due to the Respondent's failure to take issue with these concepts and instead rely on—what I submit—are the more superficial issues raised herein.
>
> Rather, I would address myself to the basic constitutional issues—as I see them—raised in this case."

Thereafter, Appellant's *entire* oral argument was concerned with the constitutional issues and claimed violation of the 14th Amendment, U.S. Constitution provisions respecting Due Process and Equal Protection. These were again ignored by Appellee in oral argument. Incidentally, the author of the pending motion was not present at either court appearance.

The only written opinion of a California state court in this action does refer to one aspect of the constitutional challenge (Appendix A—p. 6, paragraph 2) but assumes the validity of Labor Code Section 555 without reference to its constitutionality (*Id.* p. 3, paragraph 4).

Appellant thereafter in his Petition for Hearing in the California Supreme Court (Record, No. 15) again set forth the challenges on constitutional grounds and *for the first time in this entire proceeding* the Appellee joined some of those issues in his Answer to Petition in the California Supreme Court (Record, No. 16). Nowhere in said Answer did Appellee raise the point that the constitutional issues had not theretofore been properly or timely raised in this action.

ARGUMENT.

1. Appellant Has Properly and Timely Raised the Federal Questions in the State Courts.

In a federal system it is important that state courts be given first opportunity to consider constitutional challenges to state's laws. *Crowell v. Randell,* 10 Pet. 368, 9 L. Ed. 458.

Whether or not a federal question has been properly raised in the state courts is itself a federal question and one which the United States Supreme Court is not bound by the decision of state courts. *Street v. New York,* (1969) 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572.

A state can not invoke a procedural rule to defeat an otherwise meritorious federal claim. *O'Connor v. Ohio,* (1966) 385 U.S. 92, 87 S. Ct. 252, 17 L. Ed. 2d 189.

California law requires that constitutional questions be properly raised in trial court before they can be considered on appeal. *Sacramento and San Joaquin Drainage District v. Supreme Court,* (1925) 196 Cal. 414.

As noted in the Statement hereinabove, and as reflected by the Record in this case, Appellant raised constitutional issues from the pleading stage on through the appellate levels of the State courts. Concededly said issues were—at first—very general but became more specific in the appellate levels. Furthermore, they were finally met by Appellee (without raising the rule in the *Sacramento* case, *supra*). Finally, they were, in part passed on by the only state appellate court that heard the case.

Is Appellant to be denied relief herein because Appellee refused to take issue with the federal questions raised? Can the State courts avoid further review in the federal system merely by ignoring a party's claimed constitutional challenge? Appellant submits that to do so would be to put "form" above "substance" in the law.

2. The Judgment Below Can Not by Any Reasonable Interpretation Rest Upon an Adequate Non-Federal Basis.

When considered in the context of the pleadings, Points and Authorities, Briefs and Oral Argument in the 4th District Court of Appeal, the only written opinion of a California court in this action (Appendix A) must—of necessity—be based upon laws (statutory or decisional) that have been challenged as to their constitutionality. There is no other basis for the results.

It is obvious that the Judgment of the Trial Court herein was rendered on the basis of Appellee's grounds as stated in his Demurrer (Record No. 3) which states:

> "The complaint fails to state facts sufficient to constitute a cause of action in that it does not allege the existence of a law, ordinance or resolution authorizing overtime pay or compensatory time off for an officer in plaintiff's position and classification. (C.C.P. 430 (6))"
>
> "The complaint is uncertain in that it does not apprise the defendant of the specific law, ordinance or resolution upon which plaintiff's claim is based. (C.C.P. 430 (7))"

The 4th District Court of Appeal's opinion affirming said judgment also clearly indicates that the *basis*

for the Trial Court's judgment is its interpretation that the decisional rule of law in California regarding public employees is valid, *i.e.* there must be some "written law" to provide for the claimed compensation herein. Necessarily, and logically, it follows that said court considered the restrictions in Labor Code Section 555 to be a valid restriction to only one city in California (viz. the City and County of San Francisco) and therefore inapplicable to Appellant's case.

Appellee's discussion in his Motion to Dismiss (p. 6 *et seq.*) that the California Court of Appeal considered Appellant's "professional responsibility" as a basis for the judgment is out of context. Said discussion refers to those facts as having a bearing on the applicability of the doctrine of estoppel (Appendix A —p. 6, paragraph 1).

Appellee's further discussion on this ground is *Appellee's interpretations* of the applicable Labor Code sections and not that of the 4th District Court of Appeal nor any other court in this action (Appellee's Motion to Discuss, p. 7, paragraph 2 *et seq.*).

Conclusion.

For all the foregoing reasons, and based upon the facts of this case and the grave constitutional issues raised as set forth in Appellant's Jurisdictional Statement, Appellant requests that the Motion to Dismiss be denied and that this honorable court exercise jurisdiction to hear this matter on its merits.

Respectfully submitted,

R. R. CAMPAGNA,
Attorney at Law,
Attorney for Appellant.